Case No. S17A1317

IN THE SUPREME COURT OF GEORGIA

WOMEN'S SURGICAL CENTER, LLC, d/b/a Georgia Advanced Surgery Center for Women, DR. HUGO D. RIBOT, JR., M.D. and DR. MALCOLM BARFIELD, D.O.,
Petitioners,

v.

CLYDE L. REESE, III, in his individual capacity and in his official capacity as Commissioner of the Georgia Department of Community Health, and RACHEL L. KING, in her individual capacity and in her official capacity as Health Planning Director of the Georgia Department of Community Health,

Respondents.

Fulton County Superior Court, Case No. 2015-CV-262659

PETITIONERS' OPENING BRIEF

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Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Constitutional Provisions

Other Authorities

JURISDICTION

Plaintiffs brought this action in the Superior Court of Fulton County, pursuant to the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment and GA. CONST. art. III, § VI; art. I, § I, ¶ VII; and art. I, § I, ¶ I. The Superior Court had jurisdiction pursuant to 42 U.S.C. § 1983 and O.C.G.A. § 15-6-8. Defendants moved to dismiss, the motion was denied, and the Superior Court granted a Certificate of Immediate Review. This Court summarily denied Defendants' Petition for Interlocutory Review and Motion for Reconsideration. The parties then moved for summary judgment. After a hearing, the Superior Court granted summary judgment for Defendants and against Plaintiffs on all counts on Oct. 31, 2016. The Superior Court explicitly passed on each of Plaintiffs' state and federal constitutional challenges to Georgia's certificate of need ("CON") laws. *See* Final Order, R–1283–1291. Plaintiffs timely filed a notice of appeal on Nov. 28, 2016, and Defendants filed a notice of cross-appeal on Nov. 30, 2016. This Court has jurisdiction. GA. CONST. art. VI, § VI, ¶ II(1); s*ee Fulton Cnty. v. Galberaith*, 282 Ga. 314, 315, 647 S.E.2d 24, 26 (2007); *Atlanta Indep. Sch. Sys. v. Lane*, 266 Ga. 657, 657–58, 469 S.E.2d 22, 24 (1996).

INTRODUCTION

Plaintiffs Dr. Hugo D. Ribot, Jr., M.D. and Dr. Malcolm Barfield, D.O. co-own Plaintiff Women's Surgical Center, LLC d/b/a Georgia Advanced Surgery Center for Women ("GASC"), an outpatient surgery center in Cartersville. R-979 ¶2, 981 ¶11. After many other surgeons asked to operate at GASC, Plaintiffs

decided to add a second operating room and contract with other surgeons to let them use the facility. R-984 ¶ 43. More doctors and more operating rooms would mean better access to care, lower costs to patients, and more charity care. R-988–90 ¶¶ 79-82, 89-90, 94, 96. Plaintiffs seek the freedom to (1) add an operating room and (2) open their surgery center to more qualified doctors and their patients when the surgery center sits idle. R-982–83 ¶¶ 22, 33. The only thing preventing them from doing either is Defendants' enforcement of Georgia's CON laws. *Id.*

Georgia's CON laws, O.C.G.A. § 31-6-1 *et seq*. and GA. COMP. R. & REGS. 111-2-2-.01 *et seq.*, forbid Plaintiffs from contracting with qualified doctors to allow them to use Plaintiffs' state-of-the-art surgery center and to serve more patients, unless Plaintiffs effectively get permission from their own competitors. R-980 ¶ 4, 982 ¶ 21, 987 ¶ 68. This is the very definition of a monopoly—forbidden by the Georgia Constitution. CON laws do not protect public safety and welfare, but instead allow existing medical providers to block Plaintiffs from offering more and better services to the public, *solely because existing providers want no new competition*. R-984 ¶¶ 44, 45, 47, 986 ¶¶ 61, 64, 988 ¶ 83, 991 ¶¶ 113–15. Those laws therefore constitute what one court has called a "Competitor's Veto":[1] an arbitrary prohibition on Plaintiffs' liberty to provide safe and competent services exclusively for the illegitimate purpose of protecting existing businesses from economic competition.

[1] *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014).

Plaintiffs do not seek a CON; this is a facial and as-applied constitutional challenge to the very existence of the CON approval process. Defendants' enforcement of the CON laws has caused a life-saving medical facility to sit idle, and has deprived patients of access to medical services, for no reason other than to protect existing medical providers from economic competition. That is a moral travesty, and it is unconstitutional.

PLAINTIFFS' PAST AND PRESENT INJURIES

GASC provides minimally-invasive laparoscopic surgery in a comfortable, easily accessible alternative to the often cold and overwhelming environment of most hospitals. R-980 ¶ 5. Since opening in 2010, hundreds of outpatient procedures have been performed at GASC—all with same-day patient discharge and zero incidences of transfusion, post-operative infection, wound complication, or readmission. *Id.* ¶ 6. Procedures that once required large incisions, hospitalization, and painful recovery can be performed at GASC in a single day. GASC has been recognized for its rigorous safety standards and outstanding patient outcomes. GASC competes directly with CON-approved operating rooms, but its prices are thousands less for the same (or better) care. R-983 ¶ 38.

Nevertheless, the CON laws forbid Plaintiffs from adding a second operating room or from contracting with other doctors to use GASC. R.-982–83 ¶¶ 21, 28, 33. Doing either without a CON is punishable by ruinous fines of $5,000–$25,000 *per day*, based on the duration of the violation. R-986 ¶ 61. Defendants enforce

those penalties through offensive legal action. R-981 ¶¶ 14–15.

GASC currently operates under a "Letter of Non-Reviewability," a narrow CON exclusion that allows only GASC's owners and full-time employees to use the facility. R-981 ¶ 16. No other surgeons can use GASC. R-982 ¶ 21. Contracting with other surgeons to use GASC when Drs. Ribot and Barfield are busy delivering babies would help cover the facility's costs, give more patients access to a state-of-the-art surgery center, and provide more opportunities for charity care. [2] R-980 ¶ 4, 982–83 ¶¶ 21-24, 30, 32, 34, 39. The only thing stopping GASC from realizing its full potential to serve patients is Defendants' enforcement of the CON laws.

In 2014, Plaintiffs applied for a single-specialty CON. R-984 ¶ 42. Preparing their application cost $1,000 and required hiring a consultant who spent 200 hours and charged tens of thousands of dollars. *Id.* ¶¶ 44, 47. To obtain a single-specialty CON, Plaintiffs were required to apply for permission to add a second operating room. R-982 ¶ 29. Yet a single-specialty CON would give Plaintiffs only a half-measure of the freedom they seek; it would allow them to contract with other OB/GYNs, but not with *all* qualified surgeons. R-982 ¶ 21, 985 ¶ 55. Had they applied for a multi-specialty CON (which would allow them to open GASC to *all* qualified surgeons, not just other OB/GYNs), the CON laws would have required them to have *three* operating rooms. R-983 ¶ 35, 1034 ¶ 27.

The requirements for a CON are as follows: an applicant must demonstrate

[2] Currently, 18.5% of GASC patients are indigent (5.5%), charity (0.1%), Medicare (6.6%), and Medicaid patients (6.3%). R-1057, Table D.

that "[t]he population residing in the area served, or to be served, by the new institutional health service has a need for such services," that "[e]xisting alternatives for providing services in the service area" are unavailable, and that "[t]he proposed new institutional health service has a positive relationship to the existing health care delivery system in the service area." R-986–87 ¶ 67. The term "positive relationship" is not defined; but Defendants contend that competing for existing services does *not* create a "positive relationship." R-1070.

In addition to these requirements, the CON laws also allow competing healthcare facilities to object to any applicant, R-987 ¶ 68-69, and the applicant is *not* "allowed to speak in rebuttal" at the opposition hearing. R-987 ¶ 71. While objections must be "substantive," no evidence is required. R-957.

Thus, when Plaintiffs applied for a single-specialty CON, three hospitals objected that there was no need for more competition. R-985 ¶ 52. Defendants accordingly denied Plaintiffs' CON application, not because granting the CON posed any threat to public health and safety—there was no suggestion that GASC was incapable of serving more doctors and patients safely. Instead, Defendants rejected Plaintiffs' application on the basis that allowing more doctors to use GASC "would not have a positive impact on the health care delivery system in the service area." *Id.* ¶ 50. The existing health care delivery system, Defendants admit, consists of Plaintiffs' competitors. *Id.* ¶ 51.

This case does not appeal Defendants' denial of Plaintiffs' CON application.

Instead, Plaintiffs' previous CON application is referenced only as a background fact: to show how Georgia's CON laws work in practice, that Plaintiffs have been injured by those laws in the past, and to substantiate their allegation that they continue to be injured absent an injunction. R-982 ¶¶ 22, 26. Plaintiffs' injuries in this case are caused by the massive penalties which will be imposed on Plaintiffs if they operate their surgery center in the way that best serves their community without first obtaining a CON. R-986 ¶ 61. The issue is not whether Defendants properly applied the CON laws when denying Plaintiffs' application, but the constitutionality of requiring such an application in the first place.

ENUMERATION OF ERRORS

The Superior Court erred (1) in granting summary judgment to Defendants and denying Plaintiffs' motion for summary judgment on Counts 1–4 of the Complaint; (2) in ruling that the CON laws do not authorize any contracts or agreements and that GA. CONST. art. III, § VI, ¶ V is limited to contracts and agreements; (3) in ruling that the Privileges and Immunities Clause, GA. CONST. art. I, § I, ¶ VII, is not intended to protect citizens from state-granted monopolies; (4) in ruling that Plaintiffs' claims under GA. CONST. art. I, § I, ¶ I are subject to "the traditional rational basis test," that the "affected with a public interest" test is inapplicable, that "there is no evidence that the CON laws engage in price fixing or controls," and that the CON laws survive scrutiny under GA. CONST. art. I, § I, ¶ I; and (5) in concluding that the CON laws survive rational basis review pursuant to

the Due Process Clause of the Fourteenth Amendment.[3]

ARGUMENT

I. Standard of Review

This Court reviews a grant of summary judgment de novo, viewing the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *Kaplan v. City of Sandy Springs*, 286 Ga. 559, 560, 690 S.E.2d 395, 396 (2010). "[W]hen only a question of law is at issue, as here," this Court "owe[s] no deference to the trial court's ruling." *Montgomery Cnty. v. Hamilton*, 337 Ga. App. 500, 503, 788 S.E.2d 89, 92 (2016), *cert. denied* (Feb. 27, 2017) (quotations and citations omitted).

II. The CON Laws Violate Georgia's Anti-Monopoly Clause.

The Anti-Monopoly Clause, GA. CONST. art. III, § VI, ¶ V, prohibits laws that "authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly … or … defeating or lessening competition." This Clause "illustrate[s] the state policy against 'defeating or lessening competition, or encouraging a monopoly.'" *Executive Town & Country Servs., Inc. v. Young*, 258 Ga. 860, 863, 376 S.E.2d 190, 192 (1989). It prohibits "'[a] privilege or peculiar advantage vested in one or more persons or

[3] Plaintiffs concede that their cause of action under the Privileges or Immunities Clause of the Fourteenth Amendment is foreclosed by the *Slaughter-House Cases*, 83 U.S. 36 (1872). Plaintiffs reserve that issue.

companies, consisting in the exclusive right (or power) to carry on a particular business or trade.'" *Ken Stanton Music, Inc. v. Board of Educ. of City of Rome*, 227 Ga. 393, 397, 181 S.E.2d 67, 70 (1971) (quoting Black's Law Dictionary). The CON laws violate both the explicit prohibition on anticompetitive contracts and the "state policy against 'defeating or lessening competition, or encouraging a monopoly.'" *Executive Town & Country*, 258 Ga. at 863, 376 S.E.2d at 192.

A. The CON Laws Authorize—Indeed Mandate—Anti-Competitive Contracts.

Through anticompetitive restrictions on the right to contract, Georgia's CON laws create "a substantial barrier to entry by new competitors and to expansion by existing ones," ensuring "little chance that other firms (new or old) would be able, in the face of anticompetitive practices, to spur competition." *F.T.C. v. University Health, Inc.*, 938 F.2d 1206, 1219 (11th Cir. 1991). While the legislature may have the best intentions, anticompetitive means are forbidden in Georgia whatever the purpose. This Court has emphasized that it is wrong to rationalize an anticompetitive law simply because it "comes dressed in attractive garments, and is covered with a sugar coating in order that the victim will accept it unaware of its future destruction of his own freedom." *Moultrie Milk Shed, Inc. v. City of Cairo*, 206 Ga. 348, 352–53, 57 S.E.2d 199, 202 (1950).

Specifically, this Court has forbidden limits on competition in the health care business, because relying on the police power cannot justify a monopoly.

Macon Ambulance Serv., Inc. v. Snow Properties, Inc., 218 Ga. 262, 267, 127 S.E.2d 598, 602 (1962) ("a monopoly cannot be validly created by connecting such creation with the exercise of the police power."). In the same way that this Court prevented Macon from restricting competition among ambulances because an exclusive ambulance franchise "tends to encourage monopoly and defeat competition," this Court should prevent Defendants from restricting competition among outpatient surgery centers. *Id*. at 266, 127 S.E.2d at 601.

Under the CON laws, Plaintiffs must contract with doctors to work exclusively at GASC, either as full-time employees or as partners in the practice. R-981 ¶ 19. This means that Plaintiffs could legally hire as many full-time employees as they like, but cannot contract with independent doctors to use the facility. *Id.* CON-approved operating rooms are not subject to this limitation; any qualified doctor in any specialty can operate in a CON-approved multi-specialty facility. R-957. GASC is thereby barred from competing with CON-approved operating rooms. Thus the CON laws mandate anticompetitive contracts that lock doctors into a single operating room and prevent them and their patients from searching out the best facilities.

This does nothing to ensure high standards of medical care. Instead, the direct and obvious effect of these anticompetitive contracting restrictions is to prohibit GASC from competing economically against CON-approved facilities. *See City of Atlanta v. Stein*, 111 Ga. 789, 36 S.E. 932, 934 (1900) (striking down

ordinance limiting City printing contracts to 4 of 19 companies in Atlanta because officials "have no more right to restrict competition than to defeat it altogether.").

The CON laws do not hinge on an applicant's skills, qualifications, education, experience, or "fitness or capacity to practice" the profession. *Schware v. Board of Bar Exam'rs of State of N.M.*, 353 U.S. 232, 239 (1957). Qualifications and safety are simply not included in the lengthy list of "considerations" in the CON process. *See* O.C.G.A. § 31-6-42. An applicant with great experience, a perfect safety record, and a superb education enjoys no advantage in obtaining a CON, and an incompetent or dishonest practitioner is barred from practicing medicine by other laws, not by the CON laws.

Instead, the CON laws exist to limit competition. As the undisputed facts show, the CON laws block access to medical services *not* because doctors are a danger to the public, but simply because existing providers do not want competition—in the case of GASC, existing CON-approved operating rooms across the street at Cartersville Medical Center and at Floyd Medical Center and Kennestone Hospital. R-985 ¶¶ 52–54. If Defendants conclude that existing surgery services are "adequate" and reject a CON application, they do so solely on the basis of the new service's impact on competitors, *without regard* to the applicant's "fitness or capacity to practice" or provide a safe surgical setting. *See Stein*, 111 Ga. 789, 36 S.E. at 934 (quoting *Adams v. Brenan*, 52 N.E. 314, 316 (1898)) ("'The board of education may stipulate for the quality of material to be

furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons … necessarily creates a monopoly in their favor.'"); *cf. Schware*, 353 U.S. at 239.

In short, the CON laws authorize—indeed, require—contracts that limit competition between and among CON-approved and non-CON approved facilities. By authorizing GASC to only enter into anticompetitive contracts that lock doctors into one facility—and excusing CON-approved operating rooms from that mandate—the CON laws limit competition, to the detriment of patients and to the economic benefit of Plaintiffs' competitors. R-955 ¶ 56, 989 ¶¶ 89, 93–95.

B. This Court Struck Down Laws that Impose Anti-Competitive Contract Terms Similar to the CON Laws.

Defendants admit that the Anti-Monopoly Clause has been properly applied by this Court to strike down a statutory scheme remarkably similar to the CON laws: they say that *Georgia Franchise Practices Comm'n v. Massey-Ferguson*, 244 Ga. 800, 262 S.E.2d 106 (1979), is "an example of the Anti-Competitive Contracts Clause[4] properly applied." *Reese v. Women's Surgical Ctr.*, No. S16I0883, Pet.

[4] "Anti-Monopoly Clause" is the standard term for provisions like GA. CONST. art. III, § VI, ¶ V. *See, e.g.*, Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1079 (2013). Undersigned counsel is unable to find Defendants' idiosyncratic terminology in any primary or secondary source. But using one term or another does not affect the scope of the Clause's protection. *Young*, 258 Ga. at 863, 376 S.E.2d at 192; *cf. Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech' but we have long recognized that its protection does not end at the spoken or written word."). Plaintiffs therefore refer to it by its ordinary name: the Anti-Monopoly Clause.

for Interlocutory Review at 23 (Ga. Sup. Ct. Feb. 22, 2016). Defendants have also pointed to this Court's decision in *Executive Town & Country Servs., Inc. v. Young*, 258 Ga. 860, 863, 376 S.E.2d 190, 192 (1989), as demonstrating the proper scope of the Anti-Monopoly Clause. Pet. for Interlocutory Review at 22.

In *Young*, this Court held that an Atlanta ordinance setting prices for limousine service could violate the Anti-Monopoly Clause. 258 Ga. at 863, 376 S.E.2d at 192. This Court reversed a summary judgment for the defendants because the ordinance's restrictions on competition implicated "the state policy against 'defeating or lessening competition, or encouraging a monopoly.'" *Id*. In the same way that Atlanta set anticompetitive contract terms for car services and riders, the CON laws here set anticompetitive contract terms for Plaintiffs and other doctors. In both cases the Anti-Monopoly Clause is implicated.

But even more than *Young*, Defendants' *Massey-Ferguson* admission is fatal to their defense, because the Franchise Practices Act ("FPA") struck down in that case echoes the CON laws in purpose, function, and effect. To "assure a sound distribution of motor vehicles," the FPA allowed any licensed dealer to protest new dealerships in a given "sales area." 1976 Ga. Laws 1441; 1979 Ga. Laws 1628–29. If a manufacturer wanted to establish a new dealership, it had to first give notice to the Franchise Practices Commission and to the other dealers in the area. 1979 Ga. Laws 1632. The Commission would then hold a hearing where existing dealers could object to a new competitor. *Id*. New dealerships could not open without

Commission approval—or without competitors' approval. *Id*. This Court struck down the Act as unconstitutional, holding that by "dividing sales areas among the franchised dealers and protecting them from competition, [the FPA was] properly declared to violate the Georgia Constitution." 244 Ga. at 802, 262 S.E.2d at 108.

The CON laws mirror the competitor's veto process rejected in *Massey-Ferguson* step for step: carving the State into discrete health planning areas, allowing existing firms to keep competitors off their turf, requiring costly hearings where businesses can object to new competition, and requiring state approval before a surgery center can contract with new doctors to provide services. R-985–88 ¶¶ 57, 60, 67, 68, 70, 71 78; O.C.G.A. 31-6-47(a)(18); GA. COMP. R. & REGS. 111-2-2-.10(4)(a)(2); O.C.G.A. § 31-6-43(d),(g),(h); O.C.G.A. § 31-6-44(d); GA. COMP. R. & REGS. 111-2-2-.20(2)(g); O.C.G.A. § 50-4-7.

Massey-Ferguson and this case both involve laws that protect existing businesses by stopping competitors from contracting, and by giving them veto power over new competition. Just like the law challenged in *Massey-Ferguson*, the CON laws are designed to "permit the establishment of a market allocation among [medical providers] and thereby prevent any competition between [medical providers] in the sale of the same [healthcare services]." 244 Ga. at 801, 262 S.E.2d at 107–8; R-986–87 ¶¶ 67-69. Because both laws "permit [existing health care providers] to restrict competition and create a monopoly in the [medical business]," and "prevent any competition between [existing] dealers and [new]

companies," they are both unconstitutional. 244 Ga. at 801, 262 S.E.2d at 107–8.[5] And, as this Court made clear in *Macon Ambulance* and *Moultrie Milk Shed*, the fact that the CON laws touch on matters of health does not excuse them from the limits of the Georgia Constitution.

C. Even if the CON Laws Didn't Authorize Contracts, They Would Violate "the State Policy Against 'Defeating or Lessening Competition, or Encouraging a Monopoly.'"

The CON laws are designed to reduce competition to protect established health care providers' revenues; any effect they have on health care services is incidental to the CON laws' principal aim of reducing competition. The CON laws only function by "defeating or lessening competition"—which violates "the state policy against 'defeating or lessening competition, or encouraging a monopoly.'" *Young*, 258 Ga. at 863, 376 S.E.2d at 192.

That the CON laws are designed to reduce competition is illustrated by the facts of this case. The CON laws employ euphemisms like "avoid[ing] unnecessary duplication of services," O.C.G.A. § 31-6-1, and ensuring the "population residing in the area served … has a need for [the] service[]," O.C.G.A. § 31-6-42(a)(2); however, the evidence shows what these phrases mean: preventing competition.

But for Defendants' enforcement of the CON laws, Plaintiffs would contract

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[5] *Massey-Ferguson* was abrogated in 1983 when the state Constitution was amended to allow for motor vehicle franchise laws. GA. CONST. art. III, § VI, ¶ II(c). The rule of *exclusio alterius* shows that by amending the Constitution to allow a narrow exception, *specifically for franchises*, the broader understanding of the Anti-Monopoly Clause employed in *Massey-Ferguson* otherwise remains valid.

with qualified doctors to use GASC when its operating room would otherwise sit idle. R-982 ¶ 22. The CON laws prohibit those contracts. *Id.* ¶ 21; O.C.G.A. § 31-6-47(a)(18); GA. COMP. R. & REGS. 111-2-2-.10(15). But for Defendants' enforcement of the CON laws, Plaintiffs would contract with some of those doctors to sell ownership shares in GASC. The CON laws prohibit those contracts. *Id.* ¶¶ 25-26; O.C.G.A. § 31-6-47(a)(18); GA. COMP. R. & REGS. 111-2-2-.10(4)(a)(15), (18). But for Defendants' enforcement of the CON laws, Plaintiffs would add an additional operating room to GASC. R-983 ¶¶ 32-33. The CON laws prohibit that growth. R-982 ¶ 28; O.C.G.A. § 31-6-47(a)(18)(A)(ii).

Why do the CON laws prohibit this expansion of care? Because it "would not have a positive impact on the health care delivery system in the service area." R-985 ¶ 50. Defendants admit that "[t]he existing health care delivery system includes Plaintiffs' competitors." *Id.* ¶ 51. To wit, competition would not have a positive impact on Plaintiffs' competitors, so the CON laws forbid competition.

Limiting competition is the *only* thing CON laws do; even Defendants admit that the CON laws have nothing to do with public health and safety, have nothing to say about the licensure of medical professionals, and are unrelated to regulating doctors' fitness or capacity to practice medicine. R-988 ¶¶ 75-77, 84. After pages and pages of briefing in this Court and the court below, Defendants have never articulated any rational reason why allowing licensed and qualified surgeons to use GASC when its operating room sits idle, or adding a second operating room to

increase scheduling flexibility, could negatively affect public health or safety.

Just the opposite is true. The CON laws consolidate care and push patients to larger facilities rather than giving them and their doctors the flexibility to seek care in the customized, localized environment of a surgery center like GASC. The practical effect, for GASC's OB/GYN patients, is that the CON laws

> force women to travel long distances to get [treatment] in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. … Another commonsense inference … is that these effects would be harmful to, not supportive of, women's health.

Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318 (2016).[6]

Numerous courts have observed that CON laws are inherently anticompetitive. *See, e.g., F.T.C. v. Hospital Bd. of Dir., Lee Cnty.*, 38 F.3d 1184, 1192 (11th Cir. 1994) (Florida's CON laws "make[] it more difficult for any new hospital to enter the market or for any existing hospital to obtain the state's authorization to construct new hospital facilities."); *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1393, 1398 (5th Cir. 1996) ("suppression of competition was the foreseeable result of [Mississippi's CON laws]" and the laws "clearly contemplated anticompetitive conduct").

Georgia's CON laws have been singled out by both the U.S. Supreme Court

[6] GASC does not provide the services at issue in *Whole Woman's Health*, but the Court's "commonsense inference[s]" about access to care remain salient.

and the Eleventh Circuit as anticompetitive. *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1016 (2013) ("We recognize that Georgia, particularly through its certificate of need requirement, does limit competition in the market for hospital services in some respects."); *University Health*, 938 F.2d at 1219 ("The FTC demonstrated that Georgia's certificate of need law—which regulates the addition of hospital services based on the need of the public—is a substantial barrier to entry by new competitors and to expansion by existing ones … Such barriers make concentrated markets more threatening, since there is little chance that other firms (new or old) would be able, in the face of anticompetitive practices, to spur competition.").

The CON laws not only allow, but encourage, existing providers to raise objections addressing how new competition will affect their revenues. R-986–87 ¶¶ 67–71. The Georgia Alliance of Community Hospitals ("GACH") has repeatedly opposed CON applications because competition, particularly from ambulatory surgery centers like GASC, would have "substantial negative economic impact upon *the financial performance* and sustainability of Georgia's community hospitals." R-990 ¶ 101 (emphasis added). And GACH members raised similar economic objections to Plaintiffs' CON application. R-985 ¶ 52. As Plaintiffs' experience demonstrates, those anticompetitive objections are all that is needed for Defendants to enforce the CON laws and restrict competition. R-984–85 ¶¶ 44–54.

Plaintiffs' experience is consistent with data on CON applications, which

demonstrate a Competitor's Veto at work: opposition from competing hospitals is essentially the kiss of death for a CON applicant. R-990–91 ¶¶ 103–16.

Plaintiffs are in Health Planning Area 1, where 65 CON applications were granted, denied, or withdrawn in the last 10 years. R-990 ¶¶ 102; 103. The overwhelming majority of opposed applications were denied or withdrawn—75%. R-991 ¶ 106. But *unopposed* applications were *always* granted. R-990 ¶ 105. Thus, if a competitor objected the likelihood of success dropped from 100% to 25%.

CON applications for ambulatory surgery centers ("ASCs") statewide show a similar effect. There were 88 CON applications for ASCs granted, denied, or withdrawn in the past 10 years. R-991 ¶ 107. Opposition was disastrous: half of all applications were opposed, and opposed applications were twice as likely to be denied or withdrawn. *Id.* ¶¶ 108-09. While 66% of *unopposed* applications were granted, only 27% of *opposed* applications were granted. *Id.* ¶¶ 110–11. Of the few applications granted over opposition, 64% were subsequently appealed. *Id.* ¶ 112. Those appeals averaged nearly two years from the date of application, *id.* ¶ 113, with some stretching out almost four years. *Id.* ¶¶ 114–15. Several applications granted over opposition were ultimately withdrawn by the applicant after lengthy appeals. *Id.* ¶ 116. The bottom line is clear: the best way to get a CON is to avoid opposition from competitors—i.e., don't compete.

Plaintiffs' expert witness further quantified the anticompetitive effects of Georgia's CON laws. R-989 ¶ 90. Relying upon his expertise as a professor of

economics, his published empirical research on CON laws, and additional peer-reviewed empirical research, Dr. Thomas Stratmann found that Georgia's CON laws restrict competition and lead to fewer medical services in both rural and non-rural communities. R-988–89 ¶¶ 79, 81, 89, 91.

Dr. Stratmann also found that CON laws tend to increase healthcare costs. The anticompetitive effects of CON laws are associated with hospital stays that are 5% longer in CON states. R-988–89 ¶¶ 82, 92, 94. CON laws raise healthcare spending by 3.1% overall and 5% for physician care. R-989 ¶ 94. These higher revenues inure to the benefit of hospitals, but do not create greater access to healthcare for the poor through charity care. *Id.* ¶ 95. Dr. Stratmann's empirical findings show that CON laws "reduce the number of medical providers … lessen access to medical care in urban as well as in rural areas, offer patients fewer choices, and lessen the number of medical inputs (such as medical equipment) …." R-989–90 ¶ 96. But for the CON laws, competition for healthcare services would increase and Georgians would have more options for care. R-990 ¶ 97.

Dr. Stratmann's findings are consistent with a 2004 federal study "concluding that the anticompetitive risks associated with CON programs have thwarted any of their potential economic benefits." *Mercy Crystal Lake Hosp. & Med. Ctr. v. Illinois Health Facilities & Serv. Review Bd.*, 59 N.E.3d 27, 39 ¶ 43 (Ill. App. 2016) (Schmidt, J., concurring) (citing Dep't of Justice & FTC, Improving Health Care: A Dose of Competition, 22 (July 2004)). Like Dr.

Stratmann, the FTC and the DOJ found that CONs "actually contribute to rising prices by inhibiting competitive markets that would be able to control the costs of healthcare and guarantee quality and access to treatment and services." *Id*.[7]

Defendants admitted in the Superior Court that the CON laws are a "restraint of trade," R-1123, but claimed that a mix of mistaken or unsupported assertions by CON law consultant Daniel Sullivan justify limiting competition. Plaintiffs' expert, Dr. Thomas Stratmann, based his expert opinions on recent peer-reviewed empirical studies.[8] It was error for the Superior Court to give any weight to Mr. Sullivan's generalized speculation, unsupported by empirical data. *See Bradford Mortg. Co. v. Johnnie Ganem Appraisal Co*., 310 Ga. App. 165, 169, 712 S.E.2d 859, 862 (2011) ("Bradford's expert affidavit contained generalized arguments that amounted to mere conclusions, which have no probative value to pierce the facts

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[7] The federal government mandated states pass CON laws until 1986 but, "[r]ealizing that its efforts had been a complete failure," the federal government now fights against CON laws. *Mercy Crystal Lake Hosp*., 59 N.E.3d at 39 ¶ 42; *see also* FTC Commissioner Maureen K. Ohlhausen, Keynote Address, Global Antitrust Economics Conference (2015) ("CON laws have outlived their intended use and now effectively serve primarily, if not solely, to assist incumbents in fending off competition from new entrants."), https://www.ftc.gov/system/files/documents/public_statements/645861/150529gmukeynote.pdf

[8] Mr. Sullivan is a paid consultant to CON applicants and objectors. R-596 ¶¶ 7, 8. His most recent presentation on CON was in 2003. R-619. He last published in 1985 and has never published anything about CON laws or their efficacy. *Id.*

Dr. Stratmann holds a Ph.D in Economics from the University of Maryland and has published many peer-reviewed studies on the impact of state CON laws. R-1032 ¶¶ 2, 4. Dr. Stratmann serves as the University Professor of Economics and Law at George Mason University. *Id.* ¶ 2.

presented by the movant for summary judgment. Therefore, Bradford has failed to point to or adduce specific evidence that gave rise to a triable issue in this regard.") (footnotes, quotations, & citations omitted); *see also Bridges v. Dep't of Transp.*, 209 Ga. App. 33, 34, 432 S.E.2d 634, 635 (1993) (in dispute regarding a land survey, affidavit that merely stated a conclusion that measurements were incorrect, without providing factual basis for conclusion, was insufficient to overcome summary judgment); *Denson Heating & Air Conditioning Co. v. Oglesby*, 266 Ga. App. 147, 148, 596 S.E.2d 685, 686 (2004) ("Although an opposing party is entitled to the benefit of reasonable inferences, an inference cannot be based on mere conjecture or probability, or on evidence that is too uncertain or speculative.") (citations omitted); *Hill v. Jackson*, 336 Ga. App. 679, 681, 783 S.E.2d 719, 723 (2016), *cert. denied* (Oct. 17, 2016) ("Guesses or speculation which raise merely a conjecture or possibility are not sufficient to create even an inference of fact for consideration on summary judgment."). The specific failings of Mr. Sullivan's speculation are set forth in great detail at R-1237–42.

The Anti-Monopoly Clause does not allow regulation for the sake of reducing competition. CON laws are *explicitly* that sort of regulation. The CON laws force GASC to go unused, denying patients potentially lifesaving health care, for the sole purpose of protecting existing hospitals' revenues. The CON laws' central purpose and effect is "'defeating or lessening competition, or encouraging a monopoly.'" *Young*, 258 Ga. at 863, 376 S.E.2d at 192 (citing GA. CONST. art. III,

§ VI, ¶ V). This is exactly what the Anti-Monopoly Clause prohibits.[9]

III. The CON Laws Violate the Due Process Clauses of the Georgia and United States Constitutions.

This Court has long held that "[t]he right to make a living is among the greatest of human rights, and, when lawfully pursued, cannot be denied." *Schlesinger v. City of Atlanta*, 161 Ga. 148, 159, 129 S.E. 861, 866 (1925). Under the Due Process Clause, this Court has "examine[d] closely" restrictions on the "free exercise of business activities." *Porter v. City of Atlanta*, 259 Ga. 526, 528, 384 S.E.2d 631, 634 (1989).

Laws that "regulate an industry not affected with a public interest," or "restrict[] competition" "violate the due process clause." *Massey–Ferguson*, 244 Ga. at 802, 262 S.E.2d at 108. The CON laws violate the due process clause for both those reasons, because neither Plaintiffs' surgery center specifically nor the health care business generally are "affected with a public interest," *see Harris v. Duncan*, 208 Ga. 561, 564, 67 S.E.2d 692, 694 (1951) and the CON laws are obviously anticompetitive.

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[9] Likewise, privileges and immunities clauses "prohibit[] … state government grants of exclusive privileges [that] functioned in much the same way as did the antimonopoly provisions." Calabresi & Leibowitz, *supra* at 1079. Georgia's Privileges and Immunities Clause, GA. CONST. art. I, § I, ¶ VII, has been held to protect citizens from the arbitrary denial of constitutional rights. *See Hudson v. Jennings*, 134 Ga. 373, 67 S.E. 1037 (1910); *Massell v. Leathers*, 229 Ga. 503, 505, 192 S.E.2d 379, 381 (1972) (Gunter, J., dissenting); *City of Atlanta v. Hill*, 238 Ga. 413, 414, 233 S.E.2d 193, 193–94 (1977) (overturning *Massell*).

A. The CON Laws Violate Georgia's Due Process Clause Because They "Regulate an Industry Not Affected With a Public Interest."

Like the anticompetitive laws struck down by this Court in *Massey-Ferguson* and *General GMC Trucks, Inc. v. General Motors Corp*., 239 Ga. 373, 237 S.E.2d 194 (1977), the CON laws fail the "affected with a public interest" test because they inhibit competition to manipulate prices.

As GACH's attempts to intervene in this case demonstrate, eliminating the anticompetitive constrains of the CON laws would allow prices to decrease and cause "economic injury" to GACH's members. R-166–67. GACH and its members were candid here: *their interest in the CON laws is propping up prices and revenues,* not public safety or consumer protection. *Id*. GACH's intervention was denied because its members' interest in maintaining monopoly power under the CON laws is, tellingly, the same as Defendants' interest in defending the CON laws. *See* R-524; R-214–17. The CON laws are meant to control the price and availability of medical services through constraints on competition; as such, they can only be justified if the healthcare business is "affected with a public interest."

"Affected with a public interest" is a term of art that means the regulated business "must be so applied to the public as to authorize the conclusion that it has been devoted to a public use and thereby its use, in effect, granted to the public." *Batton-Jackson Oil Co. v. Reeves*, 255 Ga. 480, 482, 340 S.E.2d 16, 18 (1986). The sorts of industries "affected with a public interest" are those that naturally tend toward monopoly, such as "common carriers, telegraph and telephone companies,

ferries, wharfage, etc." *Tyson & Bro.-United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 430 (1927).[10] This is why, for example, Georgia regulates the electric utility market—to *decrease* the tendency toward monopolization in a public utility. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 767–68, 213 S.E.2d 596, 603 (1975) ("The regulation of utilities is now ordinarily based on the theory of regulated monopoly rather than competition").

Georgia's CON laws, by contrast, exist solely to *create* monopolies that would not otherwise exist, by reducing competition in an industry that is not "affected with a public interest." Simply because health care is "important," or "affect[s] the health of the people," or "that it [i]s important to keep an adequate and constant supply at a price fair to both producer and consumer" does not make it a business "affected with a public interest." *Harris*, 208 Ga. at 564, 67 S.E.2d at 694. Nor is it enough for the General Assembly to express "a feeling of concern in regard to its maintenance." *Id*. Such declarations are not controlling on the courts and do not indicate that an industry is "affected with a public interest." *GMC Trucks*, 239 Ga. at 378, 237 S.E.2d at 197; *Massey-Ferguson*, 244 Ga. at 802, 262 S.E.2d at 108; *see also Strickland v. Ports Petroleum Co*., 256 Ga. 669, 670, 353 S.E.2d 17, 18 (1987) (price restrictions on gasoline unconstitutional because they were anticompetitive and gasoline sales was not affected with a public interest "no

[10] In *Harris*, 208 Ga. at 564, 67 S.E.2d at 694, this Court adopted the U.S. Supreme Court's description of "affected with a public interest" as explained in *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929), which itself relied on *Tyson*.

matter what other states or the Supreme Court of the United States 'may or may not have decided.'" (citation omitted)).

Obviously Georgia has the power to regulate the practice of medicine. Plaintiffs have never claimed otherwise. But Defendants admit that the CON laws are not concerned with Plaintiffs' fitness and capacity to practice medicine. R-988 ¶ 77. This Court's precedent evidences the distinction between professional regulation and restrictions on competition. In striking down anticompetitive milk laws in *Harris,* or dealership licensing laws in *Massey-Ferguson,* or restrictions on gas prices in *Strickland*, because none of these industries was affected with the public interest, this Court was obviously not suggesting that milk production, dealerships, or gasoline sales could not be regulated to protect the public. Rather, because these industries were not "so applied to the public as to authorize the conclusion that it has been devoted to a public use and thereby its use, in effect, granted to the public," *Batton-Jackson Oil Co.*, 255 Ga. at 482, 340 S.E.2d at 18, they did not fall within the category of "affected with a public interest," and so the legislature could not impose anticompetitive restraints on those industries.

The same principle applies here. The legislature may regulate the *practice* of medicine to protect the public, but the CON laws do not do that. The CON laws do what the law may *not* do: impose anticompetitive restraints on the business of medicine, "notwithstanding the public or the General Assembly would have a feeling of concern in regard to its maintenance." *Harris*, 208 Ga. at 564, 67 S.E.2d

at 694. The CON laws fail the "affected with a public interest" test because they inhibit competition in order to manipulate prices in an industry not "granted to the public"; Georgia's Due Process Clause therefore prohibits the CON laws.

B. The CON Laws Also Violate Georgia's Due Process Clause By Restricting Competition.

Even if the CON laws regulated an industry "affected with a public interest," or if that test did not apply, they would nevertheless be unconstitutional because they serve only the illegitimate purpose of restricting competition. This Court has held that economic restrictions are "not presumptively reasonable, but must be demonstrably reasonable after the affected interests are balanced." *Porter*, 259 Ga. at 528, 384 S.E.2d at 633. The evidence must show that a law "realistically serves a legitimate public purpose, and it employs means that are reasonably necessary to achieve that purpose, without unduly oppressing the individuals regulated." *Advanced Disposal Servs. Middle Ga., LLC v. Deep S. Sanitation, LLC*, 296 Ga. 103, 105, 765 S.E.2d 364, 367 (2014) (citation omitted). Moreover, this Court must look closely at any challenged regulation to ensure that it serves a public, as opposed to a private, purpose. *See Strickland*, 256 Ga. at 670, 353 S.E.2d at 18.

The CON laws reduce competition to favor established medical providers, and thus reduce the availability, quality, and affordability of health care. R-989 ¶¶ 88–89, 91, 92-94; *University Health*, 938 F.2d at 1219. The CON laws focus squarely on the economic health of existing firms that do not want competition.

Thus, the CON laws fail to realistically serve a legitimate public purpose, because preventing lawful competition is not a legitimate government purpose. *See Strickland*, 256 Ga. at 670, 353 S.E.2d at 18.

In *GMC Trucks*, this Court held that stopping manufacturers from expanding dealer networks violated due process. 239 Ga. 373, 237 S.E.2d 194. Similar reasoning should apply here. The law in *GMC Trucks* prevented new competition unless an applicant could "show that the dealer is not providing adequate representation or that a new dealer can be added without reducing the existing dealer's business." *Id.* at 377, 237 S.E.2d at 197 (emphasis added). This Court held that the "purely anticompetitive" law was unconstitutional because "[t]he legislature may not use its power to protect a special group from competition." *Id*.

The CON laws work the same way: they allow Defendants to deny a CON to qualified healthcare providers if "an assessment of the aggregate utilization rate of existing services" does not, in a competitor's view, demonstrate a "need" for additional services, or when new healthcare services will not result in "a positive relationship to the existing health care [providers] in the service area." GA. COMP. R. & REGS. 111-2-2-.40(3)(a); GA. COMP. R. & REGS. 111-2-2-.09(1)(h). In the same way car manufacturers were forbidden to open new dealerships if there was "adequate representation," the CON laws prevent Plaintiffs from contracting with doctors to operate at GASC if "[e]xisting alternatives for providing services in the service area" are available. R-981–82 ¶¶ 19-21, 985 ¶¶ 50-51, 989 ¶¶ 86-87.

Far from "realistically serv[ing] a legitimate public purpose … without unduly oppressing the individuals regulated," the CON laws serve the illegitimate private purpose of limiting competition. *Advanced Disposal Servs.*, 296 Ga. at 105, 765 S.E.2d at 367 (citation omitted). They are therefore unconstitutional.

C. The CON Laws Violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs' federal Due Process claims are subject to a lower standard of review than their Georgia Due Process claims. *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 264 Ga. 295, 298, 443 S.E.2d 833, 835 (1994). Even under that lower federal standard, however, economic protection for the sake of economic protection is not a legitimate government interest.

Laws regulating economic activity must be rationally related to a legitimate state interest. *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). The rational basis test is not "toothless," *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), and laws that do not "rationally advance[] a reasonable and identifiable governmental objective" fail this test. *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981). Laws that restrict entry into a profession are unconstitutional if they are not rationally related to the applicant's "fitness or capacity to practice" that profession. *Schware*, 353 U.S. at 239. The CON laws fail the rational basis test because their purpose is to protect the private interests of businesses against legitimate competition.

Georgia's CON laws have one mechanism to affect the marketplace for

healthcare: restricting doctors from competing with established medical providers in order to protect the revenues of those established providers. Reducing competition to protect the revenues of existing providers is not a legitimate government interest. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose[.]"); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[M]ere economic protectionism for the sake of economic protectionism is irrational … ."); *Craigmiles*, 312 F.3d at 224 ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose."); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014) (striking down CON law under same rationale); *Santos v. City of Houston*, 852 F. Supp. 601, 607–09 (S.D. Tex. 1994) (anti-jitney law).[11] The CON laws are of a piece with the laws struck down in those cases because they achieve, and are designed *only* to achieve, economic protection.

Bruner struck down a very similar CON law. That case challenged Kentucky's CON laws governing household movers. 997 F. Supp. 2d at 695. Kentucky's CON laws prevented competition among movers unless "'the existing transportation service is inadequate.'" *Id*. at 693 (quoting KRS § 281.630(1)). Like Georgia's CON laws, Kentucky's laws "provid[ed] an umbrella of protection for

[11] *Contra Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (economic protection held to be a legitimate government interest); *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015) (same, in dicta).

preferred private businesses while blocking others from competing, even if they satisfy all other regulatory requirements." *Id*. at 699. Kentucky's CON law lacked a rational basis because there was "no link between the protest and hearing procedures and any alleged government interest in health and safety." *Id*. at 700.

The same is true of Georgia's CON laws. There is "no link between the protest and hearing procedures and any alleged government interest in health and safety." *Id*. Instead, "an existing [hospital] can essentially 'veto' competitors from entering the [medical] business for any reason at all, completely unrelated to safety or societal costs." *Id*. The CON laws therefore fail the rational basis test.

CONCLUSION

Plaintiffs respectfully ask this Court to reverse the Superior Court's summary judgment for Defendants and remand with instructions to enter judgment for Plaintiffs, declaring Georgia's CON laws unconstitutional and permanently enjoining their enforcement to the extent they prevent Plaintiffs from adding an operating room or contracting with other qualified doctors to use their facility.

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